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Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1804

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHARLES D. TRAVIS, *et ux.* and
WILLIAM V. TRAVIS, *et ux.*,
Petitioners,

V.

THE STATE OF TEXAS, *et al.*
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Texas

MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

Certiorari should be denied:

I. Because the Petitioners did not press a constitutional issue in the Texas Courts and the Texas Courts did not pass upon a Constitutional issue.

II. Because it is the law in Texas, and generally, that income lost as the result of a condemnation is not recoverable as a separate and additional element of damages.

This case in the Texas state courts was a condemnation for highway purposes prosecuted by

the City of Beaumont, Texas for the State of Texas, as is the custom in Texas where a proposed state highway will traverse a city. In three Texas courts: the trial court, the Court of Appeals and the Supreme Court of Texas, Petitioners contended that they were entitled to recover rentals lost by the relocation of their tenant, *in addition* to the fair market value of the land condemned and damage to the remainder land. (Resp. App. A, pp. 4, 5, 7; Resp. App. B, pp. 7, 8, 11; Resp. App. C, pp. 2, 3; Resp. App. D, pp. 9-11; Resp. App. E, p. 4).

At no point in the case's journey through the courts of Texas did Petitioners specifically contend that the denial of an additional award for lost rentals constituted a denial of rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution (Resp. Apps. A-E). That contention *not* having been made, none of the three Texas courts that dealt with the case addressed the subject. (Pets. App. A, pp 20-55). Petitioners first *mention* (as contrasted with "contention") of Fifth and/or Fourteenth Amendment rights is found in their Motion, as Respondents in the Texas Supreme Court, seeking a stay of Mandate. Their first contention is found in their Petition for Certiorari in this Court when (Pet. p. 12) they assert that the exclusion from the jury of evidence of lost rental income constituted a taking without just compensation under Amendments V and XIV of the United States Constitution.

It is clear beyond doubt that the proposed testimony regarding lost rentals was proposed as a separate and additional element of damages. (Resp. App. A, pp. 1-9; Resp. App. C, pp. 1-4). That was the case before the Texas courts and it is perforce the case before this Court.

In the Texas Court of Appeals (Resp. App. B, p. 12) and in the Texas Supreme Court (Resp. App. D, p. 11), Petitioners' briefs did have the language:

> "Without the presentation of evidence of Owners' lost rent, the judgment resulted in an unreasonable and unjust award, and in effect, constituted the taking of Appellants' property without adequate compensation."[1]

Looking at that language in the light of the entire record, including especially the case footnoted with the quoted language, it is apparent that Petitioners were contending that they were deprived of adequate compensation when they did not get an award that included separate and additional compensation for lost rentals; that is, that their *rentals* were taken without adequate compensation therefor. In view of the record, the verbiage quoted cannot be contorted into the *pressing* of a Fifth or Fourteenth Amendment claim, as the cases require. Particularly, the verbiage cannot be so contorted when it is apparent that none of the Texas courts understood Petitioner to be contending for anything but additional, separate damages. That claim was *all* that the trial court had before it, and therefore what the Texas Court of Appeals and Supreme Court had before *them*. It is clear that the Texas Court of Appeals reversed the trial court for not permitting evidence of lost rents as a

---

[1]Art. 1 §17 of the Texas Constitution, the counterpart of the Fifth and Fourteenth Amendments to the United States Constitution requires *adequate* compensation.

separate and additional element of damages (Pet. App. A, pp. 36, 39, 42, 46), and equally clear that the Supreme Court of Texas reversed the Court of Appeals in that same regard. (Pet. App. A, p. 49).

I.

This petition for certiorari is made pursuant to 28 U.S.C. §1257 (3). The entire section provides:

> Final judgments or decrees rendered by the highest court of State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or

> authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

This petition then seeks a writ of certiorari where a ". . . right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

A federal claim - e.g., taking of property in violation of the Fourteenth Amendment - cannot be considered by the Supreme Court unless the claim was raised in the state court or considered and decided by the state court. *Illinois v. Gates*, 462 U.S. 213, 218 note, 103 S.Ct. 2317, 2321, 76 L. Ed.2d 527 (1983), in which the Court quoted with approval *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 60 S.Ct. 670, 673, 84 L.Ed. 849 (1940):

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below..."[2]

---

[2]See *Exxon v. Eagerton*, 462 U.S. 176 at 181, 103 S.Ct. 2296, 76 L.Ed. 2d 497 (1983) in which this Court declined to assume jurisdiction of an issue *addressed* by a party in the State Supreme Court but not decided by it, particularly in the light of *Gray-Taylor, Inc., v. Tennessee*, 587 S.W.2d 668 (Tex.Sup.Ct. 1979) wherein it was held that a point raised for the first time on appeal will not be considered by an appellate court.

II.

It is settled law in Texas that in a partial-taking condemnation case the landowner may show loss of profits, not as a separate item of damages, but as affecting the market value of the remaining land and improvements for the uses to which they were adapted and were being put.[3] *City of Dallas v. Priolo*, 242 S.W.2d 176 (1951). In this case, Petitioners, without exception until they moved the Texas Supreme Court for re-hearing, sought the right to introduce evidence of lost profits only as a distinct, separate and additional element of damages.[4] In their motion for rehearing they shifted their ground, but even then they argued for additional damages on account of lost profits. (Resp. App. E, p. 5).

For the foregoing reasons the petition should be denied.

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[3]Texas follows the general rule in this regard which is the same as the federal rule. See *Bothwell v. United States*, 254 U.S. 231, 233, 41 S.Ct. 74, 65 L.Ed. 238 (1920); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 675, 43 S.Ct. 684, 67 L.Ed. 1167 (1923); *United States v. Powelson*, 319 U.S. 266, 281-283, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943); *Stipe v. United States*, 337 F.2d 818, 821 (10th Circ. 1964)

[4]In their motion for re-hearing to the Texas Supreme Court Petitioners for the first time urged that they be allowed to present the evidence of lost rentals as bearing upon the value of the land condemned and damage to the remainder. That was not the case on the record before the Court.

Respectfully submitted,

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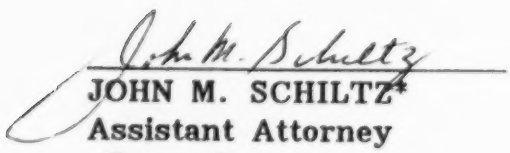

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June 10, 1987

APPENDIX A-1

46969

STATE OF TEXAS, ET AL	IN THE COUNTY COURT AT LAW
VS.	AT LAW OF
CHARLES D. TRAVIS, COUNTY, TEXAS	JEFFERSON ET UX

STATEMENT OF FACTS

VOLUME ONE OF THREE VOLUMES

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BE IT REMEMBERED that the above cause came on for trial on July 1, 1985, before the Honorable Alfred S. Gerson, Judge presiding in the County Court at Law No. One of Jefferson County, Texas, and the following proceedings were had:

(REPORTER'S NOTE: The following proceedings were had in chambers.)

MR. COOPER: Your Honor, this Motion was filed on behalf of the State of Texas and the City of Beaumont, who are Plaintiffs in this case, and the thrust of the Motion is that we request Your Honor to instruct Defendants and any witnesses on their behalf to refrain from introduction of evidence or alluding to any loss of income or rents by reason of loss or reduction of rental by reason of the impending condemnation.

What I think has happened is that the State announced the project and there was a tenant in the premises at the time and that tenant left the premises by his own election.

There is sufficient case law in my Brief, *State vs. Vaughn, Naumann v. Urban Renewal Agency* and *Parrish vs. State* supporting our position we have taken, which is the mere fact that because a letter was sent by the State indicating their intention to at some point in time condemn the property, is not sufficient for the property owners to make a claim for loss of rent where no taking or eviction of the premises had taken place, only a letter of intention and it is our position that the landowners are not entitled to loss of rent where there is not prior taking and we would request the Court to instruct the Defendants to refrain from introducing any evidence, oral or written, which relates to the loss of rent.

THE COURT: What say you?

MR. LANDREY: Your Honor, if I sound repetitious in this thing, I am doing it in that I have actually never tried or presented a condemnation case to this Court before so if you will bear with me, I would like to cover some things that might seem basic as they refer to his point against mine. Number One, he is absolutely right,

one hundred per cent right on the law that has always been the law and he cited cases, all of which I have read. In this case since it is not a whole taking of the property by the State, meaning the entire land and improvements, where there is no remainder, the law is clear that you cannot recover consequential damages of loss of rent as a result of the State having sent a letter to the owner telling him we are taking your property in the future. Therefore, his three cases all are whole takings and they clearly announce the rule that there can be no consequential loss of rent because there was never an invasion of Plaintiff's rights. That is not the case here. In our situation I expect to prove, if the Court denies his Motion, that we come under a partial taking, that they are taking approximately one and a half feet of the land involved, leaving a remaining building and land that they claim is still utilizable and, in fact, left the majority of its value. It being a partial taking, we come under the Supreme Court case which decided and settled the law in 1943 that I would like to present. It's the *City of La Grange* and I will just touch the highlights. It's a partial taking and the Plaintiff said they had damaged a property right that he had in his remainder because they blocked him off in the process and they invaded his property rights. He said they had damaged his ingress and egress. The Supreme Court, in answering said loss regarding eminent domain, makes a distinction in the taking of a whole tract of land and the taking of part. If it was a whole taking, he is not entitled to damages. But since this is a partial taking, the right to recover is established by proof of some right of property and damages measured by the extent of injuries. A business is property for which recovery can be had in eminent domain and can be measured by loss of profits. Now, where a part of a tract is condemned for said purposes and the owner claims damages to

the land left, on account of loss of profits arising from established business, such claim should be presented at the condemnation proceeding if it is of such a nature that it could have been foreseen. Where breach of contract or tort results, that is the key, to an established business in the form of loss of profits which would have been derived therefrom absent such breach, the owner may recover damages measured by the amount of profits and the same rule applies in condemnation proceedings. In this case, and I think that I can prove, they went in there three years ago and contacted a tenant of my client's in person, not by letter. They said, *We will pay you money to vacate and cancel your lease*, and the tenant said, *I'll take your money and run*, and he's gone. He's gone. And three years later in 1983 they have a taking and for the first time acquire the first one and one-half feet of what they paid the tenant to leave the entire tract. The interference was a tort. The State did it. They interferred with a contract on a remainder that they never intended to buy, and, therefore, under the Supreme Court case which says he must recover if he can prove it or is forever barred. I am saying that rent is a loss of profits. And what distinguishes my case from the ones Tyrone has is that his are whole takings and there cannot be consequential damages in a whole taking. I know that and he's right about that. But in a partial taking you must and can show any damage that is consequential or actual in showing your damage to the remainder, the way the owner is left. And I think it is absolutely admissible evidence to show that as an element of damage the evidence of tortious interference with a contract where the State did not take all of the property. If the status of our case was that it was a whole taking, I would agree. But this is a partial and he doesn't have one case on a partial taking. It would stand to reason that the State cannot go in and pay

a tenant with a contract to vacate. You simply cannot pay a man to violate his contract, but they did it. It was more than a letter. I think I can prove they paid the man to move. What I am getting down to is this---if a man, prior to the date of taking, being when the State actually acquires its right, and on a whole taking the State can always back out, likewise even on a partial taking they can back out. The owner has acquired nothing until they put up money and on whole taking the State would have the right to back out because you could never prove consequential damages as a result of a tenant vacating, but where they are leaving a remainder I do not think you can go in there and tell the tenant we will take the remainder and we will pay you to go now. We even put in another tenant and they paid him to move. So I think I should be able to show that for the pure reason that I think I am entitled to show loss of profits as a direct result of their paying the tenants to move out every time we moved one in.

MR. COOPER: Your Honor, I am familiar with this case and if you read it closer it talks about loss of access and claiming for loss of profits in a case where a road is being constructed. In our case, as of this date there has been no interference. His allegation as to the State paying tenants to move, let me say this---the policy of the State is that if there is a tenant in there he will be informed of his rights under the State Relocation Program and if he wants to move he can go to the State Highway Department and receive compensation and if he chooses to do so it is on him. I contend that no one working for the State paid them to move. Again, the policy is, if a tenant chooses to move, we are obligated to compensate that tenant for relocation. In this case they have been relocated and I contend the rule of law is the same in a partial taking as in a whole. Where there is

no invasion of a property owner's rights the State should not be obligated to pay for something they had nothing to do with. You are asking the State to subsidize a property owner when an election is made by the tenant to relocate. The State played no part in the breach of the lease and we still contend that the State should not be obligated for an election made by a tenant. Once a project is announced, should the State be obligated to pay for every tenant who elects under his rights of relocation? I contend we should not be.

THE COURT: Okay.

MR. LANDREY: In response to that, Judge, the State had no reason to pay any tenant to relocate three years ago. One of the man's property rights is to lease his property. His argument is that they just paid the tenant when the tenant voluntarily left. And I am saying I should have the right to show, and under my facts I think that I can prove, that not only was it not just a letter they sent to the tenant, but they told him that if he would vacate the premises right then, we will pay you right now. That was three years ago, Your Honor, and that's the only reason that tenant vacated.

THE COURT: Are you saying that what Tyrone says goes to the weight?

MR. LANDREY: Yes, and he cannot possibly prove that the State was contacted by a tenant, but we can show, I think, that it was the other way around. The State contacted the tenant.

MR. COOPER: Your Honor, it goes as to the admissibility, not to the weight. They are not entitled to a loss of rents and they should not be

entitled to it. If that tenant left, they could put another one in.

MR. LANDREY: Which we did and you paid him to leave, too.

MR. COOPER: They were paid for relocation.

MR. LANDREY: That's like saying you didn't interfere with someone after you enticed him with a ten dollar bill.

THE COURT: Okay.

MR. LANDREY: In other words, you paid him and I think it is an element of our damages. Keep in mind, every case he cited was a whole taking.

MR. COOPER: Well, a partial is the same.

MR. LANDREY: No, sir. Your own motion says, *incidental or consequential to the taking of entire property and for which reason the State is not liable for such consequential damages*. You cannot recover them in a whole taking.

MR. COOPER: But then I say, *there has been neither a taking nor any character of physical invasion of the property*.

MR. LANDREY: Property is not literal.

MR. COOPER: I understand that.

MR. LANDREY: It's the owner's right to use his land without the tortious interference by any entity.

MR. COOPER: And he had that right.

MR. LANDREY: He had the right, but you interferred with it prior to the taking.

THE COURT: Are you both through?

MR. COOPER: Yes.

MR. LANDREY: Yes.

THE COURT: This is off the record.

(WHEREUPON A DISCUSSION WAS HAD OFF THE RECORD.)

THE COURT: It is the opinion of the Court that with respect to loss of rental that the property owner is not entitled to recover for loss of rental. The Court thinks variances as to causes does not change the rule and the Court sustains the Motion in Limine.

(REPORTER'S NOTE: Whereupon, the proceedings resumed in Court as follows.)

THE COURT: Good morning, ladies and gentlemen. I am Al Gerson, the Judge of this Court. This is the County Court at Law and I want to apologize to you for keeping you around so long. We've had a heavy docket here this morning and everything else went wrong so please just bear with us and accept my apologizies. You've already met Mr. Stelly, I guess, and this is Miss Schofield, our court reporter. I'll get to these lawyers in a little bit, but first, let me tell you that we appreciate your being with us here today. We particularly appreciate your response to our call for your civic service and it's responsible citizens like you who come down here, because there are probably a lot of other things you would rather do

than be here, and I can understand that. Now, to acquaint you a little bit with what we call the

APPENDIX B-1

NO. 09-85-00246-CV

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS
BEAUMONT, TEXAS

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants
VS.
THE STATE OF TEXAS, ET AL, Appellees

Appeal from the County Court at Law of
Jefferson County, Texas
Honorable Alfred S. Gerson, Presiding

BRIEF FOR APPELLANTS

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APPENDIX B-2

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APPENDIX B-3

LIST OF PARTIES

The names of all parties to this litigation are:

1. The State of Texas and the City of Beaumont; and

2. Charles D. Travis, et ux and William V. Travis, et ux

APPENDIX B-4

LIST OF AUTHORITIES

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APPENDIX B-5

NO. 09-85-00246-CV

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS
BEAUMONT, TEXAS

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants
VS.
THE STATE OF TEXAS, ET AL, Appellees

Appeal from the County Court at Law of
Jefferson County, Texas
Honorable Alfred S. Gerson, Presiding

BRIEF FOR APPELLANTS

TO THE HONORABLE JUDGE OF SAID COURT:

Appellants, CHARLES D. TRAVIS, ET UX and WILLIAM V. TRAVIS, ET UX, hereinafter called *Owners*, respectfully file this their Brief on appeal of the above entitled and numbered cause. Owners/Appellants are appealing an unfavorable judgment rendered against them in favor of Appellees, the State of Texas and the City of Beaumont, Texas, hereinafter called the *State*.

APPENDIX B-6

A. *STATEMENT OF THE NATURE OF THE CASE*

This is a condemnation case wherein the State, Plaintiffs, recovered fee title and possession to a tract of land (See TR P-42 for property description.) located in Beaumont, Texas, and certain buildings thereon from Owners for the purposes of widening State Highway Spur 380. Owners' property was located on the North side of Railroad Avenue at the intersection of Washington Avenue. The condemnation was a partial taking of the real property, a whole taking of two (2) buildings and a partial taking of a third building. A visual portrait of the taking is reflected in (DX-2, SF P-462). Approximately twenty-five (25) feet (SF-67) on the street side of Owners' property was taken and all of Building #1 (wherein Owners conducted their family business) and Building #3 (which was used for storage); however, only approximately 2.4 to 2.6 feet of Owners' Building #2 (DX-2, SF P-462) was taken. At times material to this suit, Building #2 was utilized by a lessee as a business.

The date of taking of the property by the State is October 28, 1983 (TR P-17-18).

The Special Commissioners awarded $160,000.00 for the Owners' land (TR P-12). The State filed objections and exceptions to the Commissioners' award (TR P-15) followed by trial to a jury in the County Court at Law of Jefferson County followed by Owners' appeal from that jury finding.

B. *POINT OF ERROR NUMBER ONE*

Entry of judgment by the Court was error in that the State failed to prove jurisdiction.

C. *POINT OF ERROR NUMBER TWO*

The Court erred in excluding evidence of *lost rent income* (occasioned by the government's action in relocating Owners' tenant prior to the date of taking) as an element of damages to the landowners' remaining land.

BRIEF OF THE ARGUMENT

***POINT OF ERROR NUMBER ONE*: Entry of judgment by the Court was in error in that the State failed to prove jurisdiction.**

To establish jurisdiction in an eminent domain proceeding, the condemnor must prove that it has the right to condemn the land in question. See *Ready v. Marshall*, 234 SW 2d 104 (Tex. Civ. App., 1950), *Miers v. Housing Authority of City of Dallas*, 266 SW 2d 842 (Tex., 1954) and *Mayberry v. Pedernales Electric Cooperative*, 268 SW 2d 493 (Tex. Civ. App., 1973). The Court stated in *Mayberry, supra*:

> **"The record does not disclose that appellant admitted or that the parties stipulated that there existed a necessity for taking of appellant's property by Pedernales Electric, or that the condemnor has taken all steps required to effect a lawful taking. Appellant has not accepted the award of the commissioners or the money deposited by Pedernales Electric pursuant to the award or in conformity with the judgment of the Court. Appellant therefore has not waived her right to challenge jurisdiction of the Court and has not consented to the taking."**

Acceptance of the Special Commissioners' award precludes a party from contesting the State's right to take property. A further discussion of condemnation and jurisdiction is reflected in *State v. Jackson*, 388 SW 2d 924 (Tex., 1965). Although the Supreme Court reversed the case (383 SW 2d 648, Tex. Civ. App., 1964), it is distinguishable from the facts presented herein. In *State v. Jackson*, the landowner was precluded form contesting jurisdiction because at trial the State proved jurisdiction and the award of the Special Commissioners had been deposited and withdrawn by the landowner.

The record herein does not disclose that the owners admitted the right of the State to take their property, nor that the parties stipulated that the State had taken all steps necessary to effect a lawful taking. There is no evidence in the record that the Owners withdrew the award of the Commissioners or the money deposited by the State, or in conformity, with the judgment of the Court. Thus, the Owners have not waived their right to challenge jurisdiction; accordingly, the Court had no jurisdiction to proceed to judgment in that no evidence was presented on this point.

POINT OF ERROR NUMBER TWO: The Court erred in excluding evidence of *lost rent income* (occasioned by the government's action in relocating Owners' tenant prior to the date of taking) as an element of damages to the land owners' remaining land.

Recalling this is a partial taking of Owners' land, the discussion herein centers around Building #2. 2.4 feet to 2.6 feet of that building was taken. (SF P-67). Essentially, the front wall and awning

of the building which was being used by a lessee as a motorcycle shop were involved.

Owners complain that PRIOR (emphasis added) to the date of taking (October 28, 1983), the State contacted the lessee of Building #2 and eventually relocated the lessee. In 1980, Dwain Markham rented Building #2 from Owners (Travis Brothers Hardware). His business was a licensed dealer of Harley-Davidson motorcycles. In 1980, he was contacted by a representative of the State concerning relocation of his business (SF 419 P-420). The State paid his relocation expenses (SF P-420) (SF P-423). Markham was told by a State Representative if he moved then or soon, he would receive relocation assistance. If he waited until the property was condemned, he would not qualify for relocation expenses (SF P-423). He did not contact the State (SF P-423) and the first he knew of the relocation program was from the State Representative (SF P-424).

State witness, Lynwood Walters, the relocation agent, verifies the above facts in his testimony (beginning SF P-428) and indicates he had many discussions with the lessee, Markham, about relocation prior to the date of taking (SF P-432).

Markham purchased the motorcycle dealership in 1980 and the building lease expired in 1980. Markham had agreed to remain in the building for the remainder of the lease and then renegotiate the lease (SF P-426).

Prior to jury selection, the Court sustained the State's Motion in Limine, excluding Owners' evidence relating to lost rental income. (TR P-22).

By Bill of Exceptions, Owners' evidence relating to the lost rental income was tendered and overruled by the Court. (See Supplemental SF P-2 and 3.) William Travis, Owner, testified he lost $1,000.00 per month for 29 months ($33,450.00, with interest) as a result of the State's contacting and relocating his tenants prior to the date of taking (October 28, 1983). The jury should have been permitted to hear this evidence.

Again, it must be emphasized the law distinguishes condemnation of the whole of a tract of land from that where there is only a partial taking. Here, part of Building #2 and a *part* of the real estate was taken. Unquestionably, the State, *PRIOR* (emphasis added) to the date of taking, invaded Owners' property, had conversation with Owners' tenant and in fact, relocated Owners' tenant (i.e., a physical invasion of Owners' property).

In *City of La Grange v. Pieratt, et ux* (Tex., 1943), the Court discussed recovery of lost rentals in a partial taking as follows:

> "A right of recovery is established by proof of injury to some right of property, and the damages are measured by the extent of the injury to that right. Thus, a business is property, and the reasonable damages for interference with the access to business property may be measured * * * by the loss of profits."
>
> ". . . where a part of a tract of land is condemned for street or road purposes, and the owner claims consequential damages to the land left on account of the loss of profits arising from an established business being

conducted thereon while the road or street improvements are in progress, such claim may and should be presented at the condemnation proceeding if it is of a nature that it could reasonably have been foreseen and determined at the time."

"It is the law that where a breach of a contract or a tort results in damages to an established business, in the form of loss of profits, which would have been derived therefrom absent such breach of contract or tort, the owner of such business may recover damages from the party causing such loss, measured by the amount of such loss of profits. . . . We have already shown that the same rule applies in condemnation proceedings. In such proceedings, an established business is property, and damages thereto in the form of loss of profits should be taken into consideration in such proceedings."

"Profits which would have been earned by an established business, absent any interference therewith, are in their very nature more or less conjectural, uncertain and speculative, but this does not deprive the party injured by such interference of his right to recover. In other words, the difficulties which may lie in the way of making proof will not defeat a recovery. It is not necessary that damages in the form of loss of profits should be susceptible of exact calculation. All that is required is that they be ascertained with a reasonable degree of certainty."

The *La Grange* case, supra, is a partial taking, lost rent fact situation. *La Grange* appears to be a *post* (emphasis added) date of taking fact

situation; however, it is felt the principles of law therein governs this set of facts, to wit: In a partial taking of land, evidence of loss of rental income prior to the date of taking by the State are admissible as an element of damages.

Without the presentation of evidence of Owners' lost rent, the judgment resulted in an unreasonable and unjust award, and in effect, constituted the taking of Appellants' property without adequate compensation.[1]

PRAYER FOR RELIEF

WHEREFORE, premises, arguments and authorities considered, Appellants, Charles D. Travis, et ux and William V. Travis, et ux, pray that this Honorable Court:

---

[1]It is contemplated the State will cite *State vs. Vaughan*, 319 SW 2d 349 (Tex. Civ. App. - Austin, 1959, no writ) as authority for the proposition that the State is not liable for lost rental occasioned an owner resulting from a tenant vacating the property voluntarily, having heard of the condemnation. That case is to be distinguished from the facts herein in that *State vs. Vaughan*, supra (a) is a whole taking of property and (b) no physical invasion by the State occurred.

APPENDIX B-13

1. Reverse and remand for re-trial.

Respectfully submitted,

MOORE, LANDREY,
GARTH & JONES
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

BY: _____
BRACK JONES, JR.
State Bar No. 10975000

BY: _____
FLOYD A. LANDREY
State Bar No. 11866000

CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of December, 1985, a true and correct copy of the above and foregoing Brief for Appellant was served on Tyrone Cooper, City Attorney's Office, Beaumont, Texas.

BY: _____
BRACK JONES, JR.

APPENDIX C-1

46969

STATE OF TEXAS, ET AL	IN THE COUNTY COURT
VS.	AT LAW NUMBER ONE OF
CHARLES D. TRAVIS, ET UX	JEFFERSON COUNTY, TEXAS

SUPPLEMENTAL STATEMENT OF FACTS

APPEARANCES:

FOR THE PLAINTIFF:

Hon. Tyrone Cooper
Attorney at Law
801 Main Street
Beaumont, Texas 77701

FOR THE DEFENDANTS:

Hon. Floyd Landrey
Attorney at Law
285 Liberty, Suite 1900
Beaumont, Texas 77701

BE IT REMEMBERED that the above cause came on for trial on July 1, 1985, before the Honorable Alfred S. Gerson, Judge presiding in the County Court at Law No. One of Jefferson County, Texas, and at 12:15 p.m. on July 3, 1985, by agreement to perfect this Bill of Exception at said time and out of the presence of the jury, the following proceedings were had:

APPENDIX C-2

BILL OF EXCEPTION

MR. LANDREY: Comes now the Defendant in the above cause and in response to a Motion in Limine granted by the Court prior to trial herenow submits evidence in relation thereto.

WILLIAM V. TRAVIS,

having been called as a witness by the Defendants, and having been previously duly sworn by the Court, testified as follows:

QUESTIONS BY MR. LANDREY:

Q State your name, please.

A William V. Travis.

Q You are one of the Defendants in this cause, is that right?

A Yes, sir.

Q Mr. Travis, are you familiar with the fact that the State, through their representatives, contacted tenants of yours prior to October 28, 1983?

A Yes, sir.

Q And in contacting those tenants and as a direct result of offering them relocation assistance, did you lose the tenants?

A Yes, sir.

THE COURT: Wait just a minute, Mr. Landrey.

(REPORTER'S NOTE: Whereupon, a discussion was had off the record.)

THE COURT: Proceed, Mr. Landrey.

Q And did you lose the tenants as a result of the relocation assistance?

A Yes, sir.

Q And as a result of the loss of those tenants from the contact of the State prior to the date of taking, do you have an opinion of how much rent you actually lost?

A Yes, sir.

Q And would you state how many months?

A Twenty-nine months at a thousand dollars a month, sir.

Q For a total of?

A With the interest, as of that date was $33,450.00, sir.

Q And at what interest rate is that?

A Twelve per cent, sir.

MR. LANDREY: Your Honor, I would tender that evidence at this time.

THE COURT: All right. It's overruled.

COURT REPORTER'S CERTIFICATE

I, Cindy J. Schofield, Official Court Reporter in and for the County Court at Law No. One of

Jefferson County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of the Bill of Exceptions in the above styled and numbered cause, which occurred in open court and was reported by me.

Cindy J. Schofield
Certified Shorthand
Reporter
Certificate No. 473
Expires: 12-13-86

APPENDIX D-1

NO. C-5588

IN THE SUPREME COURT
OF TEXAS

* *

THE STATE OF TEXAS, ET AL
Petitioners

VS.

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants
Respondents

* *

APPEALED FROM THE COURT OF CIVIL APPEALS
FOR THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT BEAUMONT

* *

ANSWER OF RESPONDENT TO APPLICATION
FOR WRIT OF ERROR

* *

MOORE, LANDREY,
GARTH & JONES
BRACK JONES, JR.
FLOYD A. LANDREY
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

ATTORNEYS FOR
RESPONDENTS

APPENDIX D-2

LIST OF PARTIES

The following is a complete list of all parties to the action:

Plaintiffs:	The State of Texas
	The City of Beaumont
Defendants:	Charles D. Travis
	Anna Lois Travis
	William V. Travis
	Delores T. Travis

APPENDIX D-3

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APPENDIX D-4

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APPENDIX D-5

REPLY TO STATEMENT OF JURISDICTION

Respondents deny that the Supreme Court has jurisdiction to allow Writ of Error in this case in that no error of substantive law affecting this case was committed by the Court of Appeals.

Respondents deny this Court has jurisdiction of this suit under Subdivision 4 (a case involving a state revenue) and/or Subdivision 5 (a case in which the Railroad Commission is a party) of the Government Code of the Revised Civil Statutes.

REQUEST FOR ORAL ARGUMENT

In the event that the Court grants Petitioners' Application for Writ of Error, Respondents respectfully request the opportunity to orally argue said cause before the Supreme Court.

APPENDIX D-6

NO. C-5588

IN THE SUPREME COURT

OF TEXAS

* *

THE STATE OF TEXAS, ET AL

Petitioners

VS.

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants

Respondents

* *

ANSWER OF RESPONDENTS TO APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Respondents, CHARLES D. TRAVIS, ET UX and WILLIAM V. TRAVIS, ET UX, Appellants in Cause No. 09-85-00246-CV in the Court of Appeals for the Ninth Supreme Judicial District of Texas, Beaumont, Texas (and Defendants in the County Court below), respectfully submit this Brief in support of its position in the instant case, wherein the Court of Civil Appeals reversed and remanded the Judgment of the Trial Court in favor of Appellants/Respondents herein.

For purposes of clarity, the State of Texas and the City of Beaumont will be referred to as *Petitioners* and Charles D. Travis, et ux, and

William V. Travis, et ux, will be referred to as *Respondents*.

STATEMENT OF THE NATURE OF THE CASE

The opinion of the Court of Civil Appeals correctly states the nature and result of the case. The condemnation involved a partial taking, rather than a total taking of real property.

REPLY POINT OF ERROR

THE COURT OF CIVIL APPEALS CORRECTLY DECIDED IT WAS ERROR TO EXCLUDE EVIDENCE OF LOST RENTAL INCOME (OCCASIONED BY THE GOVERNMENT'S/PETITIONERS' ACTION IN RELOCATING OWNERS'/RESPONDENTS' LESSEE PRIOR TO THE DATE OF TAKING) AS AN ELEMENT OF DAMAGES TO OWNERS/RESPONDENTS REMAINING PROPERTY.

BRIEF OF THE ARGUMENT

REPLY POINT OF ERROR (RESTATED)

THE COURT OF CIVIL APPEALS CORRECTLY DECIDED IT WAS ERROR TO EXCLUDE EVIDENCE OF LOST RENTAL INCOME (OCCASIONED BY THE GOVERNMENT'S/PETITIONERS' ACTION IN RELOCATING OWNERS'/RESPONDENTS' LESSEE PRIOR TO THE DATE OF TAKING) AS AN ELEMENT OF DAMAGES TO OWNERS/RESPONDENTS REMAINING PROPERTY.

Petitioners recovered fee title and possession to a tract of land (See TR P-42 for property description) located in Beaumont, Texas, and certain buildings thereon from Owners/Respondents for the purposes of widening State Highway Spur 380. The condemnation was a partial taking of the

real property, a whole taking of two (2) buildings and a partial taking of a third building. (A visual portrait of the taking is reflected in (DX-2, SF P-462). Approximately twenty-five (25) feet (SF-67) on the street side of Owners'/Respondents' property was taken and all of Building #1 (wherein Owners/Respondents conducted their family business) and Building #3 (which was used for storage); however, only approximately 2.4 feet to 2.6 feet of Owners' Building #2 (DX-2, SF P-462) was taken. At times material to this suit, Building #2 was utilized by a Lessee as a business.

The date of taking of the property by the State/Petitions is October 28, 1983 (TR P-17-18).

Recalling this is a partial taking of Owners'/Respondent' land, the discussion herein centers around Building #2. 2.4 feet to 2.6 feet of Respondents' building was taken (SF P-67). Essentially, the front wall and awning of the building which was being used by a Lessee as a motorcycle shop were involved.

Owners/Respondents complain that PRIOR (emphasis added) to the date of taking (October 28, 1983), the State contacted the Lessee of Building #2 and eventually relocated the Lessee. In 1980, Dwain Markham/Lessee rented Building #2 from Owners/Respondents. Lessee was a licensed dealer of Harley-Davidson motorcycles. In 1980, Lessee was contacted by a representative of the State concerning relocation of his business (SF 419 P-420). The State paid Lessee his relocation expenses (SF P-420) (SF P-423). Markham/Lessee was told by a State Representative if he moved then or soon, he would receive relocation assistance. If Lessee waited until the property was condemned, he would not qualify for relocation expenses (SF P-423). Lessee did not contact the State

(SF P-423) and the first Lessee knew of the relocation program was from the State Representative (SF P-424).

State witness, Lynwood Walters, the relocation agent, verifies the above facts in his testimony (beginning SF P-428) and indicates he had many discussions with the Lessee, Markham, about relocation prior to the date of taking (SF P-432).

Prior to jury selection, the Trial Court sustained the State's/Petitioners' Motion in Limine, excluding Owners'/Respondents' evidence relating to lost rental income. (TR P-22).

By Bill of Exceptions, Owners' evidence at trial relating to the lost rental income was tendered and overruled by the Court. (See Supplemental SF P-2 and 3.) William Travis, Owner, testified he lost $1,000.00 per month for 29 months ($33,450.00, with interest) as a result of the State's contacting and relocating his tenants prior to the date of taking (October 28, 1983). The jury should have been permitted to hear this evidence.

It must be emphasized the law distinguishes condemnation of the whole of a tract of land from that where there is only a partial taking. Here, *part* of Building #2 and a *part* of the real estate was taken. Unquestionably, the State, PRIOR (emphasis added) to the date of taking, invaded Owners' property, had conversation with Owners' tenant and in fact, relocated Owners' tenant (i.e., a physical invasion of Owners' property).

In *City of La Grange v. Pieratt, et ux*, 175 S.W.2d 243 (Tex., 1943), the Court discussed recovery of lost rentals in a partial taking, as follows:

"A right of recovery is established by proof of injury to some right of property, and the damages are measured by the extent of the injury to that right. Thus, a business is property, and the reasonable damages for interference with the access to business property may be measured * * * by the loss of profits."

". . . where a part of a tract of land is condemned for street or road purposes, and the owner claims consequential damages to the land left on account of the loss of profits arising from an established business being conducted thereon while the road or street improvements are in progress, such claim may and should be presented at the condemnation proceeding if it is of a nature that it could reasonably have been foreseen and determined at the time."

"It is the law that where a breach of a contract or a tort results in damages to an established business, in the form of loss of profits, which would have been derived therefrom absent such breach of contract or tort, the owner of such business may recover damages from the party causing such loss, measured by the amount of such loss of profits. . . . We have already shown that the same rule applies in condemnation proceedings. In such proceedings, an established business is property, and damages thereto in the form of loss of profits should be taken into consideration in such proceedings."

"Profits which would have been earned by an established business, absent any interference therewith, are in their very nature more or less conjectural, uncertain and speculative,

> but this does not deprive the party injured by such interference of his right to recover. In other words, the difficulties which may lie in the way of making proof will not defeat a recovery. It is not necessary that damages in the form of loss of profits should be susceptible of exact calculation. All that is required is that they be ascertained with a reasonable degree of certainty."

The *La Grange* case, *supra*, is a partial taking, lost rent fact situation. *La Grange* appears to be a *post* (emphasis added) date of taking fact situation; however, it is felt the principles of law therein governs this set of facts, to wit: In a partial taking of land, evidence of loss of rental income prior to the date of taking by the State are admissible as an element of damages.

Without the presentation of evidence of Owners' lost rent, the judgment resulted in an unreasonable and unjust award, and in effect, constituted the taking of Appellants' property without adequate compensation.[1]

PRAYER FOR RELIEF

---

[1]Petitioners cite *State vs. Vaughan*, 319 SW 2d 349 (Tex. Civ. App. - Austin, 1959, no writ) as authority for the proposition that the State is not liable for lost rental occasioned an owner resulting from a tenant vacating the property voluntarily, having heard of the condemnation. That case is to be distinguished from the facts herein in that *State vs. Vaughan, supra*(a) is a whole taking of property and (b) no physical invasion by the State occurred.

For the reasons stated, Respondents respectfully submit this Application for Writ of Error should be refused in that the Application presents no error which requires reversal.

Respectfully submitted,

MOORE, LANDREY,
GARTH & JONES
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

BY:_____
BRACK JONES, JR.
State Bar No. 10975000

BY:_____
FLOYD A. LANDREY
State Bar No. 11866000

CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of August, 1986, a true and correct copy of the above and foregoing Answer in Response to Petitioners' Application for Writ of Error was served on Tyrone Cooper, City Attorney's Office, Beaumont, Texas.

BY:_____
BRACK JONES, JR.

APPENDIX E-1

NO. C-5588

IN THE SUPREME COURT
OF TEXAS

* *

THE STATE OF TEXAS, ET AL
Petitioners

VS.

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants
Respondents

* *

APPEALED FROM THE COURT OF CIVIL APPEALS
FOR THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT BEAUMONT

* *

MOTION FOR REHEARING

* *

MOORE, LANDREY,
GARTH & JONES
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ATTORNEYS FOR
RESPONDENTS

APPENDIX E-2

LIST OF ATTORNEYS OF RECORD FOR THE PARTIES

1. The State of Texas and the City of Beaumont:

TYRONE E. Cooper
Assistant City Attorney
City of Beaumont
P. O. Box 3827
Beaumont, Texas 77704
(409) 838-0761
ATTORNEY FOR PETITIONERS

Charles D. Travis, et ux and William V. Travis, et ux:

BRACK JONES, JR.
FLOYD A. LANDREY
Moore, Landrey, Garth & Jones
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891
ATTORNEYS FOR RESPONDENTS

2. Amicus Curiae Brief filed by:

JIM MATTOX
Attorney General of Texas

JACK HIGHTOWER
First Assistant Attorney General

MARY F. KELLER
Executive Assistant Attorney
General for Litigation

APPENDIX E-3

DUDLEY FOWLER
Assistant Attorney General
Chief, Highway Division

JOHN M. SCHILTZ
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2004

APPENDIX E-4

NO. C-5588

IN THE SUPREME COURT OF TEXAS

* *

THE STATE OF TEXAS, ET AL

Petitioners

VS.

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX

Respondents

* *

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

CHARLES D. TRAVIS, ET UX and WILLIAM V. TRAVIS, ET UX, Respondents/Landowners in this cause, make this Motion for a rehearing of the decision of the Court rendered on January 14, 1987, and show:

I.

POINT OF ERROR NUMBER ONE

THIS COURT ERRED WHEN IT HELD LOST BUSINESS PROFITS ARE NOT RECOVERABLE AS A SEPARATE ITEM OF DAMAGES OVER AND ABOVE THE FAIR MARKET VALUE OF LAND TAKEN AND THE DAMAGES OCCASIONED TO THE REMAINDER BY REASON OF THE TAKING.

APPENDIX E-5

ARGUMENT AND AUTHORITIES

First, Petitioners' argument as to lost profits as a *separate item of damage* was FIRST advanced in its Supplemental Application for Writ of Error. Neither this argument nor the *City of Dallas v. Prioli*, 242 S.W.2d 176 (Tex. 1951) was raised, cited or argued in the record or in the Court of Appeals. Respondents suggest such theory should not now be considered for the first time at this level. Also, in that the State of Texas was a party to the original proceeding, Respondents fail to see why the Attorney General can now, as a party, file an Amicus Curiae Brief.

Second, on appeal, Respondents/Landowners Point of Error Number Two (Brief for Appellants, Pg. 3) stated:

> "THE COURT ERRED IN EXCLUDING EVIDENCE OF LOST RENT INCOME (OCCASIONED BY THE GOVERNMENT'S ACTION IN RELOCATING OWNERS' TENANT PRIOR TO THE DATE OF TAKING) AS AN ELEMENT OF DAMAGES TO THE LANDOWNERS' REMAINING LAND."

Respondents disagree that their evidence offer of lost rental income was strictly tendered as a separate item of damage. The assigned error suggests such evidence should have been presented to and considered by the jury in awarding just compensation. The record does not reflect Respondents' evidence was submitted solely as a separate item of damages. Any consideration by the jury of such evidence could have been limited by a jury instruction or by the manner in which the damage issue was submitted.

Evidence of lost profits (here rental income) may be admitted as bearing upon the value of the land taken or the diminution in value of the remainder. *City of LaGrange vs. Pieratt*, 175 S.W.2d 243 (Tex. 1943), *City of Dallas vs. Prioli*, 242 S.W.2d 176 (Tex. 1951). The Ninth Court of Appeals, in its opinion, stated:

> "We must recall that this is a partial taking of the Owners' land and partial taking of a certain building. The record before us shows that this element of lost rental income, which resulted from the government relocating a certain tenant of Owners, prematurely, at least raised the issue of how much rental loss the Owners sustained. From the Bill of Exception, it is shown that 29 months, at $1,000.00 per month, was raised by the excluded evidence, together with interest amounting to $33,450.00."

> "By means of a State's Motion in Limine, prior to the jury selection, the Court, by its ruling on said Motion, excluded the Owners' evidence relating to the lost rental income. A proper Bill of Exception was developed and tendered on the lost rental income and was tendered to the Court and overruled by the Court. We determine that the jury should have been permitted to hear this evidence."

Respondents believe the Trial Court's exclusion of such evidence prevented the jury from considering evidence which was admissable as to the value of the land taken or the diminished value of the remainder.

Third, Respondents' evidence showed the State contacted the Lessee and in fact, relocated the Lessee *prior* to the date of taking. The State paid

most of Lessee's relocation expenses and assisted Lessee in moving. These acts constituted a physical invasion of Respondents' property, if not an actual appropriation of the property. *State vs. Vaughn*, 319 S.W.2d 349 (Tex. Civ. App. - Austin, 1959, no writ history), *Webb vs. Dameron*, 219 S.W.2d 581 (Tex. Civ. App. - Amarillo, Er. ref., n.r.e.). In *City of LaGrange v. Pieratt*, 142 Tex. 23, 175 S.W.2d 243 (1943) the Court stated "...thus a business is property, and the reasonable damages for interference with the access to business property may be measured * * * by the lost profits..." The entry on Respondents' land and removal of the Lessee was an interference and accordingly, evidence of Respondents' lost rental income should have been submitted to the fact finder for its determination of just compensation.

Respondents' excluded trial evidence as to lost rental income occurred *prior* to the date of taking. This fact differs from most cases reviewed. Generally, a landowner seeks recovery for lost revenue at and/or after the date of taking. In those situations, this Court has held lost business profits are not recoverable as a separate damage item. Accordingly, Respondents believe based upon their pre-date of taking loss and the pre-date of taking invasion (removal of Lessee), that this case is distinguishable from others and this Court's prior rulings.

Hypothetically, what if the State, under the instant facts, had prior to the withdrawal by Landowners of the commissioner's award for damages or prior to entry of the judgment, if no commissioner's award was tendered, dismissed its condemnation proceeding? Certainly, if the State had dismissed the proceeding, the State's entry upon Respondents' land and the removal of the tenant was an invasion and/or tort which resulted

in damage to an established business and for which the landlord could have sought recovery. *City of LaGrange, supra,* and 28 Tex. Jur. p. 215, and authorities there cited. Accordingly, Respondents' lost rental damages should have gone before the jury for their consideration.

Respondents suggest the true issue for this Court's decision to be as follows:

> MAY EVIDENCE OF LANDOWNERS' LOST RENTAL INCOME OCCASIONED *PRIOR* TO THE DATE OF TAKING BE SUBMITTED TO THE FACT FINDER ON THE ISSUE OF JUST COMPENSATION?

This Court's judgment appears to permit a condemnor to remove a landowners' lessee, prior to any legal obligation on condemnor's part, with immunity from lost rental or other damages resulting therefrom.

In this case, without the jury's consideration of Landowners' lost rental income, the judgment constitutes the taking of Respondents' property without adequate compensation.

PRAYER

WHEREFORE, Respondents request that the Court grant this Motion for Rehearing and that upon final rehearing, the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

MOORE, LANDREY,
GARTH & JONES

BY: _____

BRACK JONES, JR.
State Bar No. 10975000
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

ATTORNEYS FOR
RESPONDENTS

APPENDIX E-10

CERTIFICATE OF SERVICE

This is certify that a true and correct copy of the above and foregoing Motion for Rehearing has this day been sent to each of the attorneys of record, as follows:

Tyrone Cooper
Assistant City Attorney
P. O. Box 3827
Beaumont, Texas 77704

John M. Schiltz
Assistant Attorney General
P. O. Box 12548
Austin, Texas
78711-2548

SIGNED this 28th day of January, 1987.

_____

BRACK JONES, JR.